165-634

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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 147.

THE FOURTH STREET NATIONAL BANK OF THE CITY OF PHILADELPHIA, APPELLANT,

vs.

ROBERT M. YARDLEY, RECEIVER OF THE KEYSTONE NATIONAL BANK.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED AUGUST 3, 1894.

(15,652.)

1 In the United States Circuit Court of Appeals for the Third Circuit.

THE FOURTH STREET NATIONAL BANK OF THE CITY OF PHILADELPHIA, Appellant,
vs.
ROBERT M. YARDLEY, Receiver of the Keystone National Bank, Appellee.

Appeal from the circuit court of the United States for the eastern district of Pennsylvania.

Coram ACHESON, BUTLER, and GREEN, *JJ.:*

This cause comes before this court by the appeal of the Fourth Street National Bank of the City of Philadelphia from the decree of the circuit court of the United States for the eastern district of Pennsylvania, dismissing its bill in equity against Robert M. Yardley, receiver of the Keystone National Bank of the City of Philadelphia.

The bill charges a certain fund, to wit, the sum of twenty-five thousand dollars ($25,000), which is in the hands of the defendant as the receiver of the Keystone National bank, had been equitably assigned to the complainant by the Keystone National bank before its failure, and prays a decree directing the defendant to pay the said fund to the complainant.

The following stated facts are established:

On the 19th day of March, 1891, the said Fourth Street National bank advanced twenty-five thousand dollars ($25,000) in clearing-house gold certificates to the said Keystone National bank to enable it to meet its debtor balance in the Philadelphia clearing-house under these circumstances. On said date Gideon W. Marsh, the president of the Keystone National bank, acting on its behalf and by its authority, came to the banking-room of the said Fourth Street National bank, in the city of Philadelphia, and there represented to the officials of that bank that the Keystone National bank owed a balance at the clearing-house which it could not meet because
2 its funds were in the city of New York, and exhibited to them a memorandum showing a balance to the credit of the Keystone National bank in the Tradesmen's National Bank of the City of New York of about twenty-seven thousand dollars ($27,000), stating that his bank wished to draw against it and get clearing-house certificates; and he asked the Fourth Street National bank to accept the draft of the Keystone National bank for twenty-five thousand dollars ($25,000) against this "reserve account in the New York bank"—that is to say, against the said fund in the Tradesmen's National bank—and give his bank clearing-house gold certificates therefor. Relying upon these representations of Marsh and on the faith of his statement, supported by the said memorandum, that the Keystone National bank had in the Tradesmen's National bank the specified fund against which it proposed to draw, the Fourth Street

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National bank gave Marsh, for the use of the Keystone National bank, clearing-house gold certificates to the amount of twenty-five thousand dollars ($25,000) and took its draft, of which the following is a copy:

"Keystone National bank. No. 5086.

PHILADELPHIA, *March* 19, 1891.

Pay to the order of R. H. Rushton, cashier, ($25,000) twenty-five thousand dollars.

JOHN HAYES, *Cashier.*

To the Tradesmen's National bank, New York."

R. H. Rushton was the cashier of the Fourth Street National bank.

The books of the Keystone National bank show that on the 19th day of March, 1891, it had to its credit in the Tradesmen's National Bank of the City of New York the sum of twenty-six thousand nine hundred and seven & $\frac{32}{100}$ dollars ($26,907.32), and on the
3 same day an entry was made therein charging against that credit the said draft for twenty-five thousand dollars ($25,000) it had given to the Fourth Street National bank.

The draft for twenty-five thousand dollars ($25,000) was duly forwarded to New York for collection and was presented for payment to the Tradesmen's National bank on the morning of March 20th, 1891. Payment thereof was refused upon the ground that the drawee had not in ha-d funds of the drawer sufficient to pay the same. In fact, the Tradesmen's National bank had in cash and in collection items (drafts) for the Keystone National bank the sum of twenty-six thousand nine hundred and seven & $\frac{32}{100}$ dollars ($26,907.32), of which eighteen thousand and fifty-six & $\frac{21}{100}$ dollars ($18,056.21) were remitted by the latter-named bank to the former on March 19th, 1891, and the rest previously. The Tradesmen's National bank then had in hand in cash to the credit of the Keystone National bank the sum of nineteen thousand seven hundred and twenty-five & $\frac{62}{100}$ dollars ($19,725.62), and had in addition the said collection items to make up the full sum of twenty-six thousand nine hundred and seven & $\frac{32}{100}$ dollars ($26,907.32). Afterwards this money was paid and the said collection items or drafts were turned over to Robert M. Yardley, the receiver of the Keystone National bank, and out of the collection items he realized sixty-one hundred dollars ($6,100), and he thus had in his hands from this source when the bill in this case was filed the sum of twenty-five thousand eight hundred and twenty-five & $\frac{62}{100}$ dollars ($25,825.62) in cash.

On the 20th day of March, 1891 (some time during the morning), by the order of the Comptroller of the Currency of the United States, the Keystone National bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof.

4 Such being the established facts, and this court desiring the instruction of the honorable the Supreme Court of the United

States for the proper decision by this court of the subjoined questions or propositions of law thereon arising, it is now ordered that the following questions or propositions of law, together with the foregoing statement of the facts upon which they arise, be, and the same are hereby, certified to the said Supreme Court agreeably to the provisions of the sixth section of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, to wit:

First. Do the above-stated facts show an equitable assignment by the Keystone National bank to the Fourth Street National bank of twenty-five thousand dollars of the fund, consisting of cash and collection items or drafts as aforesaid, belonging to the Keystone National bank in the hands of the Tradesmen's National bank?

Second. If the stated facts do not show such equitable assignment of the whole twenty-five thousand dollars, do they show such equitable assignment of the cash so in the hands of the Tradesmen's National bank, namely, the sum of nineteen thousand seven hundred and twenty-five & $\frac{62}{100}$ dollars?

In testimony whereof the undersigned, the judges holding the said circuit court of appeals, have hereunto set their hands and seals this twelfth day of June, 1894.

M. W. ACHESON, [SEAL.]
Circuit Judge.
WM. BUTLER, [SEAL.]
District Judge.
EDW. T. GREEN, [SEAL.]
District Judge.

5 UNITED STATES OF AMERICA, *sct:*

I, William V. Williamson, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing certificate in the cause entitled The Fourth Street National Bank of the City of Philadelphia, appellant, *vs.* Robert M. Yardley, receiver of the Keystone National bank, appellee, was duly filed and entered of record in my office by order of said court on the twentieth day of July, 1894, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirty-first day of July, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. V. WILLIAMSON,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

6 [Endorsed:] No. 9. March term, 1894. United States circuit court of appeals, third circuit. The Fourth Street National Bank of the City of Philadelphia, appellant, *vs.* Robert M. Yardley, receiver of the Keystone National bank, appellee. Certificate for instructions. Original filed July 20, 1894.

Endorsed on cover: Case No. 15,652. U. S. circuit court of appeals, third circuit. Term No., 147. The Fourth Street National Bank of the City of Philadelphia, appellant, *vs.* Robert M. Yardley, receiver of the Keystone National bank. (Certificate.) Filed August 3d, 1894.

165-634

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

No. 147. October Term, 1896.

Supreme Court of the United States.

The Fourth Street National Bank of the City of Philadelphia, Appellant,

vs.

Robert M. Yardley, Receiver of the Keystone National Bank.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD C. DALE,
SAMUEL DICKSON,
For Fourth Street National Bank.

Allen, Lane & Scott, Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

The Fourth Street National Bank of the City of Philadelphia

vs.

Robert M. Yardley, Receiver of the Keystone National Bank.

October Term, 1896.

No. 147.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF THE CASE.

This was a bill in equity, filed by the Fourth Street National Bank of Philadelphia, against Robert M. Yardley, Receiver of the Keystone National Bank, in the Circuit Court of the United States for the Eastern District of Pennsylvania. The case came on to be heard upon bill, answer, and proofs before Hon. George M. Dallas, circuit judge, who entered a decree dismissing the bill. From this decree an appeal was taken to the Circuit Court of Appeals for the Third Circuit, and after argument, two questions of law, together with a statement of facts upon which they arise, were certified to this court in accordance with the provisions of the Act of March 3d, 1891. It is understood that this court will not consider the facts except as found by the Court of Appeals, and as it is impossible to present them more succinctly, the statement of the court is here copied at length:—

On the 19th day of March, 1891, the said Fourth Street National Bank advanced twenty-five thousand dollars ($25,000) in clearing-house gold certificates to the said Keystone National Bank to enable it to meet its debtor balance in the Philadelphia clearing-house under these circumstances. On said date Gideon W. Marsh,

the president of the Keystone National Bank, acting on its behalf and by its authority, came to the banking-room of the said Fourth Street National Bank, in the city of Philadelphia, and there represented to the officials of that bank that the Keystone National Bank owed a balance at the clearing-house which it could not meet because its funds were in the city of New York, and exhibited to them a memorandum showing a balance to the credit of the Keystone National Bank in the Tradesmen's National Bank of the City of New York of about twenty-seven thousand dollars ($27,000), stating that his bank wished to draw against it and get clearing-house certificates; and he asked the Fourth Street National Bank to accept the draft of the Keystone National Bank for twenty-five thousand dollars ($25,000) against this "reserve account in the New York bank"—that is to say, against the said fund in the Tradesmen's National Bank—and give his bank clearing-house gold certificates therefor. Relying upon these representations of Marsh and on the faith of his statement, supported by the said memorandum, that the Keystone National Bank had in the Tradesmen's National Bank the specified fund against which it proposed to draw, the Fourth Street National Bank gave Marsh, for the use of the Keystone National Bank, clearing-house gold certificates to the amount of twenty-five thousand dollars ($25,000) and took its draft, of which the following is a copy:

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The draft for twenty-five thousand dollars ($25,000) was duly forwarded to New York for collection and was presented for payment to the Tradesmen's National Bank on the morning of March 20th, 1891. Payment thereof was refused upon the ground that the drawee had not in hand funds of the drawer sufficient to pay the same. In fact, the Tradesmen's National Bank had in cash and in collection items (drafts) for the Keystone National Bank the sum of twenty-six thousand nine hundred and seven and thirty-two one-hundredths dollars ($26,907.32), of which eighteen thousand and fifty-six and twenty-one one-hundredths dollars ($18,056.21) were remitted by the latter-named bank to the former on March 19th, 1891, and the rest previously. The Tradesmen's National Bank then had in hand in cash to the credit of the Keystone National Bank the sum of nineteen thousand seven hundred and twenty-five and sixty-two one-hundredths dollars ($19,725.62), and had in addition the said collection items to make up the full sum

of twenty-six thousand nine hundred and seven and thirty-two one-hundredths dollars ($26,907.32). Afterwards this money was paid and the said collection items or drafts were turned over to Robert M. Yardley, the receiver of the Keystone National Bank, and out of the collection items he realized sixty-one hundred dollars ($6,100), and he thus had in his hands from this source when the bill in this case was filed the sum of twenty-five thousand eight hundred and twenty-five and sixty-two one-hundredths dollars ($25,825.62) in cash.

On the 20th day of March, 1891 (some time during the morning), by the order of the Comptroller of the Currency of the United States, the Keystone National Bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof.

Such being the established facts, and this court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision by this court of the subjoined questions or propositions of law thereon arising, it is now ordered that the following questions or propositions of law, together with the foregoing statement of the facts upon which they arise, be, and the same are hereby, certified to the said Supreme Court agreeably to the provisions of the sixth section of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, to wit:

First.—Do the above-stated facts show an equitable assignment by the Keystone National Bank to the Fourth Street National Bank of twenty-five thousand dollars of the fund, consisting of cash and collection items or drafts as aforesaid, belonging to the Keystone National Bank in the hands of the Tradesmen's National Bank?

Second.—If the stated facts do not show such equitable assignment of the whole twenty-five thousand dollars, do they show such equitable assignment of the cash so in the hands of the Tradesmen's National Bank, namely, the sum of nineteen thousand seven hundred and twenty-five and sixty-two one-hundredths dollars?

In support of the contention that both questions should be answered in the affirmative, the following brief of argument is herewith respectfully submitted

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BRIEF OF ARGUMENT.

It is not proposed to go into any extended discussion of the origin and nature of equitable assignments. The leading cases of Roe vs. Dawson and Ryall vs. Rowles are printed by Messrs. White & Tudor in their leading cases in equity (L. C. in Eq., vol. II., part 2, page 1530, 4th Am. Ed.), and the notes of the English and American editors cite all the important authorities down to the date of publication; and the

American and English Encyclopedia of Law, original edition, vol. I., page 834, and Mr. Beach, in his recent treatise on Modern Equity, sections 333, 334, and 335, furnish further references. As the right of the assignee is a creature of equity jurisdiction, it is natural that it should have been always held that no particular form of words was necessary to confer it. All that is requisite is that there should be a clear intention, intelligibly expressed, orally or in writing, to make the appropriation, upon an adequate consideration. The form and manner are unimportant.

The basis upon which the courts proceed is thus stated by Lord Hardwicke in Wright vs. Wright, 1 Vesey, 409, 412, in a passage which is quoted by Messrs. White & Tudor (*ut supra*, page 1560), and by Mr. Justice Daniel, in Hinkle vs. Wanzer, 17 How., 353, 368: "An assignment always operates by way of agreement or contract, amounting in the consideration of this court to this, that one agrees with another to transfer and make good that right or interest; which is made good here by way of agreement." So in Yeats vs. Groves, 1 Vesey Jun., 280, the debtor drew an order upon the purchasers of real estate to pay the amount of a note out of the purchase money for value received. Lord Thurlow said, that "the order was not a bill of exchange, being payable out of a particular fund. * * * This is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done so, and it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It was not an inchoate business. The order fixed the money the moment it was shown to Groves and Dickinson."* Again, in the leading case of Burn vs. Carvallo, 4 My. & Cr., 690, A. having goods in the hands of B., his agent at a foreign port, and having liabilities to C., promised C. that he would direct, and by a subsequent letter did direct, B. to deliver over goods to C.'s agent. Before the delivery A. became bankrupt, but it was held that C. had a

* Notice is not requisite as between assignor and assignee, nor except as against purchasers for value without notice. Ryall vs. Rowles, *ut supra*, pages 1579, 1660.

good title in equity to the goods, Lord Cottenham saying: "In equity, an order given by the debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds is a binding equitable assignment of so much of the funds, * * * but this case is far within the limits of the principle, for here there is an existing fund in the agent's hand, and there is a distinct contract to discharge such liability out of that fund and to give directions for that purpose." Assuming that the contract relates to a particular fund, and is intended to operate as a present and irrevocable transfer, it matters not how it may be expressed. The essential requisites are clearly stated in Christmas vs. Russel, 14 Wall, 69, 84, by Mr. Justice Swayne:—

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice. A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee. But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfill all the requirements of the law."

It is not essential that the contract should be reduced to writing, as an oral order or agreement is as effectual as a technical deed of conveyance under seal. In the article upon assignments in the American and English Encyclopedia of Law, vol. I., page 835, it is said: "Any words are sufficient which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration, nor is any written instrument required. Any word or writing or act which makes an appropriation of the fund amounts to an equitable assignment of the fund.

"An oral or written declaration may consequently be as effectual as the most formal instrument, and pass the right to an obligation under seal or of record." The case most commonly relied upon in support of this proposition is that of Gurnell vs. Gardner, 9 Jur. (N. S.), 1220, in which a debtor said to his creditor: "Go and sell that wool, pay B. the balance due him on such wool, and keep the remainder yourself." He died a few hours afterwards, and his administrators claimed the proceeds of the wool, but the court held that what was said established the right of the creditor to the proceeds, Vice-Chancellor Stewart saying: "It seems to me to be impossible to resist the plaintiff's claim on the ground that there was no valuable equitable assignment. I find no law which says that a valid equitable lien cannot be created by parol."

It follows, therefore, that all that was said at the time must be taken as if written, at length, in the body of the draft, and that the words spoken are as effectual as if reduced to writing, and attested by the corporate seal of the Keystone Bank.

It is submitted, therefore, that what was said and done in the present case amounted to a present, irrevocable appropriation and transfer of the specific fund. The credit was asked by the president of the Keystone National Bank upon the faith of the existence of "a balance to the credit of the Keystone National Bank in the Tradesmen's National Bank of the city of New York of about $27,000" (Record, page 1), and he proposed to transfer that specific balance, that is, he said "his bank wished to draw against it and get Clearing House certificates, and he asked the Fourth Street National Bank to accept the draft of the Keystone National Bank for $25,000 *against this reserve account in the New York bank, that is to say, against the said fund in the Tradesmen's National Bank.*" The consideration was paid by the Fourth Street National Bank upon the faith of this representation. "*Relying upon these representations of Marsh, and on the faith of his statement, supported by the said memorandum, that the Keystone National Bank had in the Tradesmen's National Bank a specified fund against which it proposed to draw, the Fourth Street National Bank gave Marsh, for the use of the Keystone National Bank, Clearing House gold certificates to the amount of $25,000.*"

Such being the relations of the parties, and it being clearly the purpose to transfer that specific balance, the Keystone National Bank gave its draft to the order of the Fourth Street National Bank for $25,000 upon the Tradesmen's National Bank of New York. (Record, page 2.) It has always been conceded by the counsel of the plaintiff that a check or draft drawn in the ordinary course of business is not, of itself, an equitable assignment of the fund, or any part thereof, in the hands of the drawee. This is the general rule, and it is so established by this court. Bank vs. Villard, 10 Wall., 152; Bank vs. Schuler, 12 U. S., 511; Florence Mining Co. vs. Brown, 124 U. S., 385. The distinction is clearly stated by Lord Hardwicke in Roe vs. Dawson, 1 Vesey, 331, where the draft was drawn upon a fund due to the drawer out of the exchequer, which was deposited with an officer from whom the fund was payable. This was held to be an assignment for a valuable consideration, good as against assignees in bankruptcy. Lord Hardwicke said:—

"This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft, not to pay generally, but out of his particular fund, which creates no personal demand; therefore, not a draft on personal credit given in the common course of negotiation, which is necessary to a bill of exchange by draft on the general credit of the person drawing, the drawee and the indorser, without reference to any particular fund. The first case of which kind I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer to the agent of his regiment, to be paid out of his growing subsistence. Then what is it, for it must amount to something. It is an agreement for a valuable consideration beforehand to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange nor a proceeding on the personal credit of Swinburne or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt, and though the law does not admit the assignment of a chose in action this court does; and any words will do, no particular words being necessary thereto."

It must be apparent that in the present instance the draft was not drawn in the usual course of business, nor accepted upon the credit of the drawer. When President Marsh stated "that the Keystone National Bank owed a balance at the Clearing House which it could not meet, because its funds were in the city of New York," he virtually proclaimed the insolvency of his bank, and it is apparent, upon the face of the transaction, that he neither requested accommodation, nor would have received it, upon the bank's own credit. The parties were no longer dealing upon that basis, but upon the existence of a particular fund which he offered and agreed to assign and make over.

Is it possible that a bill of exchange cannot, when so intended, operate as such an assignment? To make such an assertion is to forget the origin, history, and definition of that instrument. As Mr. Justice Story said, in the first chapter of his treatise upon Bills of Exchange: "The general theory upon which bills of exchange rests is that the drawer has funds in the hands of the drawee; that he sells or assigns to the payee, for a valuable consideration, such part thereof as amounts to the sum payable by the bill; that when the drawee accepts payment it is an appropriation, *pro tanto*, for the service or use of the payee or other person holding the bill under him, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor." When the object of the bill of exchange is thus recalled it cannot be doubted that originally it was a transfer of a fund belonging to the drawer in the hands of the drawee, and Blackstone's definition of a bill of exchange as an open letter of request from one man to another desiring him to pay the sum named therein to a third person on his account, is a perfectly accurate description of an equitable assignment of the fund. It so happened, however, that what Mr. Justice Story calls its use "as a facility in commercial intercourse by becoming an instrument of general circulation and credit," led to the establishment of certain artificial and technical rules, which rendered it, in itself, ineffectual to accomplish the purpose for which it was invented. Its credit came to rest, not upon the existence of a particular fund, but upon the re-

sponsibility of the drawer and indorsers. The right of the drawee to avoid responsibility to those with whom he was in no privity until acceptance, became an important factor in the development of the law, and especially in the case of banks, where it was unreasonable that they should be subject to action at the suit of any check holder.

Mandeville vs. Welsh, 5 Wheaton, 277, 286.

But here the action is virtually between the original parties. The Receiver is the mere representative of the Keystone Bank, and has no better or higher equity than his own to assert.

Bank vs. Kennedy, 17 Wall., 19;
Price vs. Abbott, 17 Fed. Rep., 506.

It cannot be doubted that if the New York bank had refused to accept the draft, or if, after notice, the Keystone Bank had attempted to withdraw the deposit, a bill could have been maintained by the Fourth Street Bank to recover the fund. As between the parties, the title had passed, not alone by reason of the drawing of the draft, but by the agreement to be gathered from all that passed at the time the draft was drawn, and of which it only constituted a part. No lawyer can draw an instrument better adapted to carry out the intention of the parties than a bill of exchange, and the fact that it has come to have a secondary use, which has grown to be of vastly greater importance than the mere transfer of a particular fund, is no reason why it should not be given its natural and appropriate significance where it was the purpose of the parties that it should have such effect.

In the case of a check, indeed, Chancellor Kent was of opinion that it was an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for. 3 Kent's Com., 104, note, seventh edition cited in Sharswood's note to Byles on Bills, page 14. And though, according to the weight of authority, a check will not operate as an equitable transfer, it has been held in many cases that as it is ordinarily drawn against an

actual deposit, and will not be paid unless the amount is standing to the credit of the drawer on the books of the banker, it is virtually an order on a particular fund and confers a specific interest in the drawee, and the American editors, in the note to Ryall vs. Rowles, *ut supra*, 1653, add, "and such will clearly be the effect when the check is so worded as to leave no doubt of the drawer's intention to transfer the entire deposit specifically to the payee," citing King vs. Perkins, 105 Mass., 115.

If, in fact, there had been no balance to the credit of the Keystone Bank, and the memorandum shown had been a mere fabrication, it cannot be doubted that President Marsh would have been liable to conviction for having obtained money by false pretenses; but if the title did not pass, his representation would have been immaterial.

By way of further illustration it may be suggested that there may be a regular course of business by which consignments are made, in consideration of an agreement to accept. The most inartificial correspondence, a clause in an invoice, a conversation between the parties, or even a talk over the telephone, will suffice to impress an equitable charge or lien upon, or to work an equitable appropriation or assignment of, goods or their proceeds, sufficient to connect the remittance and the draft. So long as both parties are solvent, the drafts are regarded as only commercial instruments drawn and accepted on the credit of the parties, but the diversion of the consignment would warrant the drawee in refusing to accept (Bank vs. Bank, 91 U. S., 92; Mason vs. Hunt, 1 Doug., 297); and on the other hand, the refusal to accept the draft would deprive the drawee of the right to appropriate the consignment, while in the case of bankruptcy or insolvency of both drawer and drawee, the bill holders could follow specifically the consignments made for the protection of the original parties to the bills. (*Ex parte* Waring, 19 Vesey, 334; Powles vs. Hargreaves, 3 DeG. M. & G., 430.) How little is needed to retain a title to property thus appropriated or dedicated to the security of a bill of exchange is abundantly illustrated in Mr. Benjamin's chapter on the Reservation of the *jus disponendi*, and in the numerous cases relating to the control of the

"shipping documents." A very large part of the business of the commercial world now consists of transactions where the bill of exchange is put in circulation, so to speak, upon the faith of specific consignments or remittances, and whenever the intention of the parties is made evident, the title to the remittance, whether of goods or in money, will be suspended or transferred, as may become requisite for the protection of the bill holder.

But if it be intended by the parties to convey the proceeds of an individual consignment, or to transfer any other fund, that purpose can be as effectually carried into effect by the use of an instrument substantially equivalent to a bill of exchange, as by a document under seal, and frequently it is the form adopted. This was the case in Roe vs. Dawson, and in Yeats vs Groves, though the fund was identified in the instrument itself, and in Pennsylvania, in the leading case of Nesmith vs. Drum, 8 W. & S., 9, the plaintiffs in a judgment gave the following order upon their attorney:—

"H. H. Budd, Esq., please pay over to William Wheelen or order the amount of the note on John Hawkins when collected, as the note is to be applied to the payment on a note in the Warren Bank; or if said Drum & Collins should pay off said note, this order to be lifted. By so doing, you will oblige."

It is obvious that this order was a bill of exchange within Blackstone's definition. It was accepted by the attorney, and attachment having been laid in the hands of the defendant, the following brief *per curiam* opinion was delivered by Chief Justice Gibson:—

"An equitable assignment is an agreement in the nature of a declaration of trust, which a Chancellor, though deaf to the prayer of a volunteer, never hesitates to execute when it has been made on valuable or even good consideration. Could there be a more explicit declaration than the order before us? Drum & Collins draw on their lawyer for the proceeds of an action against Hawkins, which they declare in the order to have been appropriated to payment of their note in the Warren Bank, on which Wheelen, the payee, was one of their sureties. If this appropriation was a condition of the contract of suretyship, it rested on a valuable consideration; if it was not, it rested on a good one, which is equally available. Drum & Collins were bound to secure Wheelen by putting funds into his hands to take up the paper at maturity if they should not, and in giving this order they yielded to a moral obligation, which is a consideration for an express contract. The appropriation then being complete as an assignment of the fund by the agreement of the parties, even without the acceptance of the drawee, could not be revoked."

So, too, an equitable assignment by means of a bill of exchange was upheld by Judge McCrary, in German Savings Institution *vs.* Adae, 8 Fed Rep., 106, where he said :—

"The controversy is thus seen to involve the question whether the execution and delivery of the bill of exchange for $1072 was in equity, in view of the facts above recited, an assignment *pro tanto* of the fund in question. It has been frequently decided that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it in the absence of proof that it was accepted by the bank or charged against the drawer. Bank of Republic *vs.* Millard, 10 Wall, 152; Marine Bank *vs.* Fulton Bank, 2 Wall, 252; Thompson *vs.* Riggs, 5 Wall, 663; Rosenthall *vs.* Mastin Bank, 21 Alb. Law J., 28, and cases cited.

"If, therefore, this were an action by a check holder against the bank upon the check there could be no recovery. But such is not the case. This is a bill of interpleader in equity, by which the plaintiff, a bank holding the fund in question, declares its readiness and willingness to pay as the court may order, and the controversy is as to the equities of the other parties, who are adversary claimants of the fund. The rule which protects a bank from being harassed by suits brought by check holders has no application to a case of this character. We are at liberty, therefore, to inquire which of the claimants here has the better right in equity to the fund in question. There are undoubtedly numerous respectable authorities which sustain the doctrine that the execution of a check in the ordinary form, not describing any particular fund, does not operate as an assignment, equitable or otherwise, of funds of the drawer in the hands of the drawee. Attorney-General *vs.* Insurance Co., 71 N. Y., 325, and cases there cited; Randolph *vs.* Canby, 2 N. B. R., 296.

"But, on the contrary, it was held by this court, in Walker *vs.* Seigel, 2 Cent. Law Jour., 508, that the rule thus broadly stated seems to apply only to cases at law, and that 'such an order, as soon as notice is given to the drawee, works an assignment in equity;' and this view is well sustained by authority. Roberts *vs.* 26 Austin, Iowa, 315; Forgarties *vs.* State Bank, 12 Rich. L. Rep. (S. C.), 518; Munn *vs.* Burch, 25 Ill., 35; 1 Daniell, Neg. Inst., page 20, section 23; Willard's Equity Jur. (Potter's Eq.), 464.

"There is certainly no good ground for holding that a check or a draft drawn upon a fund in bank is not an equitable assignment as between the drawer and payee, and in a case where there is no controversy as to the rights of the bank or drawee it does not lie in the mouth of the drawer or his assignee to say that such an instrument is not an equitable assignment. If it were conceded that, as a general rule, a check drawn upon a part of a fund in bank will not of itself operate as an assignment *pro tanto*, it is very clear to my mind that this is a case which a court of equity might well regard as an exception to any such general rule."

So in Bank *vs.* Coates, 3 McCrary, 9, Mr. Justice Miller on the circuit, sustained the rights of check holders as against an assignee for the benefit of creditors, holding the check to be an appropriation and assignment *pro tanto* of the fund upon which they were drawn.

To the same effect is Gardner *vs.* National City Bank, 39 Ohio St., 600.

It is submitted, therefore, that there is nothing in the fact

that the two bank officers adopted the form of assignment, most familiar to them, which should impair or nullify its natural and original significance. They were dealing on the faith of a particular fund, and asking and giving credit upon the faith of its transfer. Under the peculiar circumstances surrounding the transaction there can be no doubt that both borrower and lender believed that the title passed. No personal credit was extended, and it would have been a crime if the representation that there was such a fund had been untrue, or if the drawer had attempted to subsequently deal with the fund as its owner. If these propositions be true, the assignment must have been effective.

It is not deemed necessary to offer any extended argument as to the right of the Fourth Street Bank to the amount collected by the Receiver, after his appointment, from the collection items or drafts, which were at the time in the actual custody and possession of the New York bank. In the language of Lord Hardwicke: "The vendor became the trustee for the vendee;" and in Curtis *vs.* Auber, 1 Jacob & Walker, 505, 512, Lord Eldon sustained an assignment of the present and future earnings of a ship, saying: "In one case I think it was held that although you might assign the wool then growing on the backs of the sheep you could not assign future fleeces; but still it was a good and equitable assignment and rendered the future earnings liable in equity." Ryall *vs.* Rowles, *ut supra*, 1609. To the same effect are many cases, of which Pennock *vs.* Coe, 23 How., 117, and Halroyd *vs.* Marshall, 10 H. L. C., 208, are typical and conclusive.

It follows that the plaintiff is entitled to recover the full amount of the draft.

RICHARD C. DALE,
SAMUEL DICKSON,
For Fourth Street National Bank.

165-634

Supreme Court, U. S.
FILED.
JAN 12 1897
JAMES H. McKENNEY,
CLERK.

No. 147. October Term, 1896.

Supreme Court of the United States.

Fourth Street National Bank of the City of Philadelphia, Appellant,

vs.

Robert M. Yardley, Receiver of the Keystone National Bank, Appellee.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF APPELLEE.

SILAS W. PETTIT,
For Appellee.

Allen, Lane & Scott. Prs., Phila.

SUPREME COURT OF THE UNITED STATES.

The Fourth Street National Bank of the City of Philadelphia, Appellant,

vs.

Robert M. Yardley, Receiver of the Keystone National Bank, Appellee.

October Term, 1896.

No. 147.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPELLEE'S STATEMENT OF CASE.

It appears by analysis of the statement of facts contained in the certificate from the United States Circuit Court of Appeals that the Keystone Bank had with the Tradesmen's National Bank of New York on deposit, on March 19th, 1891 ..... $8,851 11
And remitted that day 18,056 21

Total credit as stated $26,907 32

And that this sum was divided as follows:—
Cash in hands Tradesmen's Bank $19,725 62
"Collection items" 7,181 70

Total as above $26,907 32

It also appears that "afterwards" (to wit, March 25th) there was turned over to the Keystone Bank's representatives out of said total—		
In cash	$19,725	62
and certain "collection items" out of which was realized (prior to this suit)	6,100	00
Making	$25,825	62
Leaving balance unaccounted for, which appears never to have been collected	1,081	70

It thus appears that on March 19th, 1891, when the check for $25,000 was given, which it is now claimed was an "equitable assignment," there was in the Tradesmen's Bank to the credit of the Keystone Bank the sum of $8851.11 only; that on the next day, when in the ordinary course of business the remittance of March 19th may be supposed to have reached New York and the check for $25,000 to be presented for payment, and assuming that the Tradesmen's Bank was then willing to treat as cash the $10,874.51 which it ultimately collected and accounted for, there was in the hands of said Tradesmen's Bank $19,725.62, and that at the time when the check for $25,000 was given said Keystone Bank did not have the funds to meet it and never thereafter did have the funds to meet it in the Tradesmen's Bank.

But it is to be noted also that there is nothing in the case as stated to this court which shows when the $10,874.50 was collected by the Tradesmen's Bank out of the $18,056.21 which the Keystone Bank remitted to it on March 19th, 1891. In the regular course of business the checks, notes, &c., remitted on the 19th would reach New York on the 20th and be collected through the Clearing House on the 21st; but however this may be, it does not affirmatively appear that the $19,725.62 referred to in the second question of the Honorable Court of Appeals was due, or had been collected or was available in the hands of the Tradesmen's Bank for the account of the Keystone National Bank on March 20th, 1891, when that bank was closed and taken possession of by the Comptroller;

non constat but that it was collected after that time in usual course.

It does not appear to be intended by the case stated to state as a fact that the "reserve account in the New York bank" was any other or different from an ordinary deposit in a New York bank by a Philadelphia bank, which by law is counted as part of its "reserve;" nor that there was any other than a general account between said banks in which was said alleged balance of "about $27,000."

Furthermore, it does not affirmatively appear by the case stated that there were not other checks drawn by the Keystone Bank in favor of other payees than the appellant against the funds *in esse* and *in posse* arising from the remittance by the Keystone to the Tradesmen's Bank made on March 19th, 1891.

Again, and to avoid misapprehension, it is not affirmatively stated in the case stated by the Honorable Court that the memorandum exhibited by Marsh to the Fourth Street Bank was signed by any one, much less that it was signed by or for the Tradesmen's Bank; it does not appear that said memorandum was anything more or other than some figures on paper exhibited and referred to by Marsh, and which he pretended to use to refresh his recollection of the exact amount of the alleged fund in the New York bank.

BRIEF OF ARGUMENT.

I. The paper given by the Keystone to the Fourth Street Bank was a check in ordinary form on the Tradesmen's Bank for $25,000, and was represented by Marsh to be drawn against the balances which he alleged the Keystone had with the Tradesmen's Bank upon a deposit account such as banks usually keep between themselves. Under the Banking Act Philadelphia national banks can count as part of their reserve against the amount of their notes in circulation and deposits the amounts they have to their credit with New York national banks. Rev. Stat., sections 5191, 5195.

So far, therefore, the check in question is the same as any check drawn by any depositor upon a bank in which he has a deposit account.

Although many respectable authorities, such as Chancellor Kent, Mr. Byles, and Mr. Morse, have held that the holder of a check drawn against sufficient funds has a right of action against the drawee, the weight of authority is the other way.

"If the check has not been revoked, by common usage the holder expects it will be paid on presentment. He may suffer a real injury by refusal, for which he may be without redress, as in the case of the drawer becoming insolvent before recourse to him could be effectual. *It would seem that the holder ought to have a remedy against the bank for a wrongful refusal of payment* arising from an implied promise from the usages of business, or the course of dealing between the parties, and so it was held in some cases prior to Bank vs. Millard."

Per Trunkey, J., Taylor vs. Bushong, 100 Pa. St., 23-27.

But Mr. Morse himself, although strongly arguing the other way, concedes that "the most numerous body of decisions sustains the view that a check is neither a legal or an *equitable assignment as between drawer and payee*, nor a sufficient foundation for *any action* by a holder against the bank."

Morse on Banks, section 493.

Accordingly, it is held by the Supreme Court of the United States that "the right of the depositor is a chose in action, and his check does not transfer the debt *or give a lien upon it to a third person* without the assent of the depositary. This is a well-established principle of law, and is sustained by English and American decisions."

Bank of Republic vs. Millard, 10 Wall., 152-157.

"Upon the second point, as to the alleged equitable assignment of the funds in the bank against which the check was drawn by Brown, Bonnell & Co. and given to the Florence Mining Company, we do not think that there can be any

serious question of the correctness of the Master's decision. The check was not drawn against any particular fund. There was, indeed, no fund out of which it could have been paid. There was only a little more than one-fifth of its amount on deposit at the time to the credit of the drawer. The notes sent to the bank for discount at the time the check was given were never discounted, and were returned to the sender. They were not used for the payment of the check unless discounted.

"An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied with such a relinquishment of control over the sum designated that the fundholder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment."

Florence Mining Co. vs. Brown, 124 U. S., 385.

A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check when he has sufficient assets in his hands; if he does not fulfill his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of Keene vs. Beard, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder.

Hopkinson vs. Forster, L. R., 19 Eq., 74.

And see also to same effect—

1st National Bank vs. Whitman, 94 U. S., 343;
Laclede Bank vs. Schuler, 120 U. S., 511-514;
St. Louis Company vs. Johnston, 133 U. S., 566-574.

It may be observed that bills of exchange and checks do not stand on the footing of orders drawn upon a particular fund with a manifested intention to create a lien thereupon, and that the tendency and preponderancy of authorities seem in favor of the rule that neither a bill of exchange nor a check on a bank can operate as an assignment or appointment of the fund in the drawee's hands, or create any manner of lien upon it.

Dana vs. Bank, 13 Allen, 445-448.

As this case arises between a Pennsylvania and a New York bank, it may not be out of place to note that the rule of this court has been fully adopted by the courts of both those States.

Taylor vs. Bushong, 100 Pa. St., 23;
Bank vs. McMichael, 106 Pa. St., 460;
Ætna Bank vs. 4th Nat. Bank, 46 N. Y., 82;
People vs. Merchants' Bank, 78 N. Y., 269;
Rislay vs. Phœnix Bank, 83 N. Y., 318.

It is to be remembered, however, that in many of the States the rule is that the giving of a check does in law operate as an equitable assignment *pro tanto* of the fund against which it is drawn. This is (or formerly was) the law in Missouri, and hence it is contended that the cases of checks on banks cited by appellant are not in point here because governed by the law then prevailing in that forum.

Bank vs. Coates, 3 McCrary, 9, contains nothing but the enforcement of the Missouri rule in this particular, while in German Savings Bank vs. Adae, 8 Fed. Rep., 106, the fund which was the subject of the interpleader did in fact belong to the checkholder before the check was given him. It was in fact, at the time the check was given to plaintiffs, money in the hands of their agents for collection, and the cases cited

by the court in support of its judgment in that case are all by courts which have adopted the same rule as Missouri, and hold a check to be, in and of itself, an assignment of the fund.

Even in those States in which the Missouri rule is adopted it is not considered to apply where there is no fund sufficient to pay the check.

"If an overdraft is presented for payment and refused, this creates no lien on the drawer's actual balance in favor of the holder of the overdraft. The deposit in the bank remains utterly unaffected by this; and the duties and relations of the bank to the drawer and to all other persons are in no respect changed. If the bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part. Whether or not it would be justified in doing so may be questioned."

Morse on Banking, section 446;
Coates vs. Preston, 105 Ill., 470.

No doubt no writing, and no particular form of words written or verbal, is needed to constitute a valid assignment in equity of a debt or other chose in action; any expression, written or verbal, is sufficient which shows the intention to transfer or appropriate a particular debt or fund to the assignee for a valuable consideration, and this is true likewise of most forms of personal property.

That ordinarily a check drawn in the usual course of business upon a deposit in a bank would operate as such an assignment is quite clear from the reasoning of the cases in those States which hold it to be such, but for reasons of commercial convenience too well established to need to be stated or defended it has been thoroughly established by this court and in the courts of many of the United States, that where the depositor is a bank or banker a check or bill of exchange drawn on it or him is not an equitable assignment in favor of the payee of the check.

A check drawn generally is not considered to be drawn on a particular fund, and, except in those States in which it is considered to be an equitable assignment of the amount mentioned therein, the legal right of the drawee of the check to

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A check drawn generally is not considered to be drawn on a particular fund, and, except in those States in which it is considered to be an equitable assignment of the amount mentioned therein, the legal right of the drawee of the check to

countermand it and forbid its payment, or to forestall it by drawing other checks and having them presented, is well established, and however dishonorable and fradulent the drawer's conduct may be, it is confidently believed that in no case has a holder of the check been permitted to recover, either at law or in equity, against the drawee, except in those States in which he has a right of action against the drawee upon the check itself, irrespective of any other circumstance. On the contrary, the general practice has been, as shown by the reports, for the payee of the check to attach the funds in the hands of the drawee as the property of the drawer of the check, a method of procedure clearly inapplicable if the giving of the check operated as an assignment.

On the other hand, if the check does operate as an assignment as between the drawee and the payee, even if it did not do so as against the bank or banker on whom it is drawn, it it is clear that upon presentation and notice to the drawee, the right of action by the payee against the drawee would accrue, and that such action does not accrue is the exact point decided by numerous cases in the Supreme Court of the United States, which have been followed by the courts of many other States, including those of Pennsylvania and New York, where the transaction now in controversy took place.

On the one hand, it is held that where the check is drawn against funds in a bank, of course that particular fund is the fund designated in the check, and that the holder of the fund is under an implied promise, arising from the well-known usage of the business, to pay the check upon demand—that the banker when he receives the deposit agrees with the depositor to pay it out on the presentation of his checks in such sums as those checks may call for, and to the person presenting them, and agrees with the whole world that the owner of such check shall, upon presentation, thereby become the owner and entitled to receive the amount called for by the check, provided the drawer shall have funds on deposit to meet it, and that there thus arises a privity of contract upon which the holder of the check may at once sue the banker in case it is dishonored. On the other hand, however, it is held that there is no privity of contract between the banker and holder of the

check when it is given; that, obviously, the check is given and accepted on the credit of the drawer alone, and not on that of the drawee, and that the payee, or owner of the check, has no rights against the bank holding the deposit until presentment and acceptance, and that otherwise great inconvenience would arise in the conduct of the business of banking.

Except for the inconveniences, the first rule would seem to be the logical one, and has in fact been frequently applied by all the courts where a check, or an order equivalent thereto, is given upon an agent or consignee or other depositary of money or property belonging to him who gives the check or other order to pay, transfer, or deliver the money or property designated therein, as the cases cited by the appellant abundantly establish. The difficulty of the appellants is not from the want of analogy between the cases they cite and the appeal they prosecute here, but arises because of the rule already referred to, now thoroughly established as law by the decisions of this court and adopted by most of the States in accordance with those decisions; whatever may be the rule governing equitable assignments of money or property in general, it is now held that a check on a banker is not an assignment of the fund on which it is drawn.

II. Nor was there in this case any special circumstance which would take it out of the general rule.

The representation by Marsh that the check was drawn against funds was only the verbal expression of that which is necessarily implied by the giving of the check itself, an implication so strong that it has been held that the drawer of a check drawn on a bank where he has no funds is liable, criminally, for a false pretense; and the cases are numerous where the vendor of merchandise has been permitted to rescind the sale on the ground of fraud when he has made delivery upon the faith of a check drawn against a bank in which the drawer had not sufficient funds to meet it.

Nor does it seem that the fact that the check was entered by the Keystone Bank in its account against the Tradesmen's Bank should affect the question. Such entry would almost certainly be found in every case where a check is drawn, and

in no case could it have less weight than in the one under consideration, because in this case the bank did not, as matter of fact, have the balance in the Tradesmen's Bank which its books pretended it had, and such check was in fact an overdraft when made.

The case stated shows that when the check for $25,000 was drawn there was only $8851.11 to the credit of the Keystone Bank with the Tradesmen's Bank, and although it is true that Marsh may have supposed or expected that certain funds which he had remitted, or intended to remit, would arrive in time to meet the check given the Fourth Street Bank, yet, nevertheless, as sufficiently appears from the case stated, such funds as were remitted were not accepted as cash by the Tradesmen's Bank.

It is respectfully submitted that the fact that the Fourth Street Bank gave value for the check, and that the check was fraudulently drawn, ought not to alter the case.

The question is not whether the Keystone Bank owes the Fourth Street Bank the $25,000, for that is conceded, but the question is whether the giving of the check conferred upon the Fourth Street Bank any title to the sum then or thereafter to its credit with the Tradesmen's Bank, and whether by virtue of this title it can follow that fund in the hands of the Receiver. It has already been shown that no such title was conferred, either generally or by reason of the representation, or by reason of the entry of it in the books of the Keystone Bank, and there is certainly nothing in the fraud of Marsh which would alter the rule.

The Citizens' National Bank of Raleigh, N. C., on the 22d and 24th of March, 1888, delivered to the State National Bank checks which had been deposited with the Citizens' Bank drawn on the State Bank, thereby surrendering their claim against their depositors and making themselves responsible therefor, and accepted the checks of the State National Bank upon its New York correspondent. As matter of fact, the State National Bank was fraudulently insolvent, and its president and cashier were getting ready to, and on March 24th did, fly the country. It does not clearly appear what was the condition of the account between the State National

Bank of Raleigh, N. C., and the New York bank, but it would seem that it had a balance to its credit, although not sufficient to pay the two checks in question.

The Citizens' National Bank filed its bill asking for a decree giving its demand a preference over the general creditors of the bank, but the court, per Seymour, J., held that the transaction was but the ordinary transaction of business between banks residing in the same place, and that if the plaintiff was defrauded the fraud consisted in the fact that the insolvent bank continued to do business after it was insolvent, which, for obvious reasons, could give no preference, nor would the fraud of the officers entitle the plaintiff to a preference.

"Although at the time those checks were given the plaintiff had taken the State National Bank's checks, it had not then finally charged itself with them, and it would, had not the debtor bank given these checks, have charged the checks on it to its own customers who had deposited them and thus put the loss on them. This may be so. *But the court knows of no principle upon which a general fraud gives the person defrauded a lien on a particular fund. The fraudulent giving of the check on the Park Bank has no more relation to the funds of the bank now in the hands of the Receiver than any other part of the fraudulent conduct of the absconding officers.* The only question is, has the plaintiff any lien on the funds of the defendant bank? It is plain that he has not, but it is only a general creditor who, both by the statute (Rev. St., section 5242) which forbids preferences and the general law, must stand upon an equality with all the creditors of the State National Bank."

Citizens' Nat. Bank vs. Doud, 35 Fed. Rep., 340-342.

III. The point that the Receiver has no rights other than those of the Keystone Bank does not seem to affect the question here.

By Rev. Stat., section 5242, all transfers by national banks of deposits to its credit, for its use "or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or

in contemplation thereof," are declared to be utterly null and void. The Keystone Bank was closed on March 20, 1891, and thereafter any payment on a check theretofore drawn by it was prohibited by law, and the Receiver, representing all its creditors, is entitled to all sums on deposit to its credit at the time the bank was closed, for equal distribution among them. The same rule is of familiar application in practice in other cases of insolvency, and it is believed that no case can be found, except, perhaps, some where the circumstances were extraordinary, in which the holders of any unpresented check have been held to be entitled to the bank balances standing to the credit of the insolvent at the time of the insolvency as against the assignee; certainly the every-day practice is for the assignee to take over all the bank balances of the assignor in preference to the holders of unpresented checks, who come in only for their dividend thereon out of the general fund. And that this is the usual practice is again shown by the numerous cases in which the right of stoppage *in transitu* has been exercised by the holders of such checks upon the ground of the failure of the consideration for which they had sold their merchandise.

If, then, as contended by the appellant, president Marsh, when he applied to the Fourth Street Bank, "virtually proclaimed the insolvency of his bank," the appellant is out of court, for the statute prohibited payment of the Keystone Bank's debt to the Clearing House. But however this may be, the point involved seems to have been already directly decided by this court.

Israel & Co. drew a check on the Laclede Bank of St. Louis in favor of Schuler on October 20th, 1885, and on October 24th made an assignment for the benefit of creditors, of which the Laclede Bank was at once notified by telegraph.

On October 26th the check was presented and payment refused, whereupon Schuler filed his bill in equity against the bank upon the ground that "the check was an assignment or appropriation of so much of these funds to the benefit of complainant which he is entitled to enforce in this suit" (page 512); i. e., that it was an equitable assignment.

This court said, "Apart from this matter it is not easy to

see any valid reason why the assignment of an insolvent debtor for the equal benefit of all his creditors and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker."

Laclede Bank vs. Schuler, 120 U. S., 511-515.

IV. The appellant's contention is that the check given was an equitable assignment; but an equitable assignment of what?

(a.) Certainly not of the pretended fund of about $27,000, for the check was for $25,000 only. It thus does not fall within the line of the few cases in which the fact that the check was for the exact amount remaining on deposit has, together with other circumstances, been held to evidence an equitable assignment of the fund in the hands of the drawee.

(b.) Certainly not of the $8851.11 in the hands of the New York bank when the check was drawn; as to that the rule as to overdrafts certainly applies.

(c.) Neither can it be held to apply to the $10,874.51 which the New York bank subsequently received, either alone or added to the $8851.11; neither sum, nor both together, answer the description in the check given.

(d.) Nor can it be said to apply to the remittance made on the 19th March, for, again, that sum does not fulfill the description of the check.

(e.) And even if everything is added together, the difficulty still remains.

The New York Bank had on March 19th.....	$8,851 11
and received on March 20th "collection items"...	18,056 21
Making together	$26,907 32

Certainly the check given did not cover all these sums and items, for they amounted to more than the check, and if the check is to be considered an equitable assignment of any of these "collection items," of which ones was it such an assignment? Of those collected by the New York bank, or of those collected by the Receiver, or of those never collected at all?

It was not of money alone, for there was not enough there; it was not of the money and the "collection items," for they were too much; and if it was an assignment of anything, then it should have designated the particular moneys or "collection items" so assigned.

Again, in respect to these "collection items," another difficulty arises. The term implies that they were notes, drafts, or checks on banks of, or keeping accounts in, New York, or from which city they could be most readily collected, belonging to depositors of the Keystone Bank and deposited with it by them. These were forwarded the day before the Keystone Bank was closed, and it must be assumed that it was on March 19th insolvent, and that its insolvency was known to its officers, and it would therefore seem to follow that the proceeds of such "collection items" not received in New York and collected until on or after the date that the Keystone Bank was closed belong to those who so deposited them with that bank.

"Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself, even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper if it is still in the possession of the depositor (depositary).

"When a customer deposits a check on another bank without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it."

Morse on Banking, section 586;

And this is the rule adopted by the Federal courts.

Balbach vs. Frelinghuysen, 15 Fed. Rep., 675;
Beale vs. Summerville, 50 Fed. Rep., 649;
St. Louis Ry. Co. vs. Johnson, 133 U. S., 575.

It is submitted that it is impossible to designate exactly of what the check can be considered to have been an assignment, equitable or legal, and that the case presented shows no "particular fund" to have existed at all, but that it presents the ordinary case of a check drawn on a bank partly on funds on

deposit and partly on funds to be deposited in the ordinary course of business, presented for payment, and dishonored because the funds to be sent had not in fact been received, or accepted as cash, by the drawee, and in respect to such a case it cannot be said that the check is an assignment of anything, or is other than a mere order to pay, subject to countermand by the assignment or insolvency of the drawer, without overruling a long line of decisions of this court which have now become the rule of decision in most of the States of the Union. It seems to be peculiarly a case in which the maxim of *stare decisus* should be applied. The opinion of Judge Dallas, who heard and decided the case in the Circuit Court, is printed as an appendix.

SILAS W. PETTIT,
For Appellee.

APPENDIX.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The Fourth Street National Bank of the City of Philadelphia

vs.

Robert M. Yardley, Receiver of the Keystone National Bank.

October Session, 1891.

No. 7.

It is authoritatively settled for this court that a check or draft drawn upon a fund in the hands of a banker in the ordinary course of business is not an equitable assignment of such fund or of any part of it. Bank vs. Millard, 10 Wal., 152; Bank vs. Schuler, 120 U. S., 511. The learned counsel for the complainant, whilst frankly admitting this to be the rule, insists that the giving of a check may, "in connection with other circumstances, be evidence of such equitable assignment." Conceding this, the question is as to the sufficiency of the circumstances relied on in this case; and these, according to the statement thereof in the complainant's brief, are as follows: On March 19th, 1891, G. W. Marsh, the president of the Keystone National Bank, called at the Fourth Street National Bank and stated to the cashier that he had a heavy debt in the Clearing House against his (Marsh's) bank, and that all its funds, or the greater part of them, were in New York, so much so that it could not meet its debt in the Clearing House, and asked if the Fourth Street National Bank would accept its (the Keystone's) draft against its reserve account in the New York bank for this sum of money and give him Clearing House gold certificates. Mr. Marsh supported this statement by showing a memorandum giving the exact balance which the Keystone Bank had with the Tradesmen's National Bank of New York city, a sum between $26,000 and $27,000. Upon this statement the Fourth Street Bank

gave to the Keystone Bank Clearing House certificates for $25,000 and accepted a draft for the same amount, drawn by the Keystone Bank on the Tradesmen's Bank of New York. The general ledger sheet of the Keystone Bank showed a balance to its credit with the Tradesmen's Bank at the close of business of March 19th, 1891, after deducting this draft for $25,000, of $1757.32.

Accepting for the present purpose this presentation of the facts, we have an express statement by the president of the Keystone Bank that a fund was provided for payment of the draft; but between a draft taken in reliance upon such a statement and an assignment of the particular fund the distinction is obvious, and of the latter, or of any intent that the transaction should be, in effect, anything different from what it was in form, I perceive no indication whatever.

It seems, too, that Marsh's statement that the Keystone Bank had between $26,000 and $27,000 with the Tradesmen's Bank was not true, and that the general ledger sheet of the Keystone Bank, to which reference has been made, was not correct; but inasmuch as, irrespective of these matters, the fundamental proposition upon which the case of the complainant rests cannot be sustained, no other question need be discussed.

The bill is dismissed with costs.

GEO. M. DALLAS,
Circuit Judge.

MAY 23d, 1893.